No. 9020

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a National Banking Association,

Appellee.

APPELLEE'S BRIEF.

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Appellants,

vs.

Anaheim First National Bank, a National Banking Association,

Appellee.

APPELLEE'S BRIEF.

Old Procedural Rules Govern This Appeal.

It should be remembered that, because of an order made by the trial judge upon application of plaintiffs and appellants herein [Tr. p. 162], pursuant to Rule 86 of the new Federal Rules of Civil Procedure, this appeal is governed by the procedural rules in force prior to September 16, 1938, the new rules not being considered feasible to work justice in this action.

Error in Title of Cause on Appeal.

The title of this cause on appeal, as it appears on the over and introductory page of the Transcript of Record, hould be corrected by striking out Ernest F. Ganahl as an ppellant—the appeal having as to him been dismissed efore the record was prepared [Tr. pp. 159 and 160]—nd by striking out the reference to J. V. Hogan, receiver, ntervenor, as an appellee—said Hogan never having apeared as a party defendant either as receiver or intervenor, nd there being but one defendant and appellee, to-wit, Anaheim First National Bank, a national banking assoiation.

Regarding Appellants' Jurisdictional Statement.

Most of what appears in appellants' Jurisdictional Statenent (App. Br. p. 2) is satisfactory, with these two exeptions:

In the first place, this action was filed as an action at aw and not in equity [Tr. p. 2], was tried by plaintiffs, who are appellants herein, on the theory that it was an ction at law, with written waiver of jury trial [Tr. p. 78], and was appealed as an action at law [Tr. p. 144], with a bill of exceptions prepared under the rules applicable to appeals on the law side [Tr. p. 94]. This is important in connection with appellants' attempt to argue this case "as a case in equity rather than at law" and their request for equity relief "should this Honorable Court find

this case one in equity rather than a case at law" (App. Br. pp. 26-30).

In the second place, appellants, in commenting on the pleadings, make the statement (App. Br. p. 4) that "the only issue taken is a denial that the plaintiffs and appellants entered into a lawful agreement with the bank whereby they, and each of them, agreed to purchase from said bank the depreciation then existing in the bond account." This is not the fact. This is only one phase of the matter, as a perusal of the pleadings will clearly show [Tr. pp. 4-34, 50-73]. The effect of the pleadings was to put in issue the following with reference to the more important points involved: Whether an agreement of the sort alleged by plaintiffs had in fact been entered into, irrespective of its lawfulness or unlawfulness, whether such an agreement could under the circumstances have been lawfully entered into, whether the consideration for such agreement (if actually entered into) wholly failed by reason of the appointment of a receiver for the bank and the liquidation of its assets, whether plaintiffs respectively loaned to the bank the sums alleged to have been loaned by them, the bank receiving same for the use and benefit of the respective plaintiffs and promising to repay same on demand, whether the claims filed by the respective plaintiffs with the receiver are valid or subsisting claims against the bank, and whether the bank is in fact indebted to the respective plaintiffs for the respective sums referred to in the complaint.

STATEMENT OF THE CASE.

In discussing appellants' Statement (Br. pp. 5-10) we ıust, at the outset, invite attention to the fact that it is ased on only a part of the facts as adduced at the trial.

There is no pretense that the evidence brought up on this ppeal and appearing in the Transcript of Record is all the vidence adduced at the trial. There are merely certain xcerpts of testimony representing the testimony "in part" f certain witnesses [Tr. pp. 102, 107, 111, 117, 123, 124 nd 125]; only four of the exhibits (Plffs' 1, 2 and 3, and)eft's H) are before the appellate court [Tr. pp. 118, 119, 21 and 127]; and the judge in settling the Bill of Exeptions merely certifies to the rulings and exceptions pecified therein and does not certify to said Bill of Exeptions as containing all the evidence or all the material vidence produced at the trial [Tr. p. 142].

It would therefore be impossible to give an adequate and omplete statement of the case and of the effect of the vidence adduced in the trial court without going *dehors* he record. Accordingly we must take issue with appelınts if they mean to imply that their Statement (Apps. 3r. pp. 5-10) is in substance or effect a synopsis of all he material facts and the proper conclusions to be drawn herefrom. Appellants base their Statement in large part n selected bits of evidence which, if taken alone and unɔnnected with other evidence, might conceivably lend ome color to their contentions. But the judge of the rial court had before him, in deciding the case, all the vidence, favorable and unfavorable to the plaintiffs who re now the appellants. In making his decision he resolved vhatever conflict existed in favor of defendant bank which ; now the appellee. Sitting without a jury he had to, and

did, weigh the evidence—and we have his findings and conclusions. Unless the appellate court has before it all the material evidence it cannot entertain, much less accept, appellants' statement of facts.

In addition to the general objection above indicated we must—lest the court be misguided—urge a number of specific objections to particular statements made by appellants. They put the onus of the plan for the so-called purchase of the depreciation in the bond account on bank examiner Lamm and thereby seek to bind the Comptroller of the Currency. Even from the incomplete record on appeal we can gather a certain amount of information as to this plan from the partial testimony of Mr. Lamm himself, one of plaintiffs' witnesses [Tr. p. 103]. He says that after completion of his examination a board meeting was held and "ways and means to restore the capital impairment" were discussed and he then says:

> "We devised a scheme whereby if they contributed to the bank what they would do would be to actually buy the depreciation of the bond account. That would give them a possibility of return of the money that they put in the surplus account or undivided profit account."

Apparently it was his idea and the only time it had been used before was when he used it in connection with a bank at Huntington Beach. It was not—as Lamm's subsequent answers show and despite appellants' assertion to the contrary—one of the customary methods of repairing impaired capital. The Comptroller's office never advised him whether or not it was a proper method of repairing impaired capital. He never got the approval of the Comptroller's office for it [Tr. p. 104, 105]. Obviously any

ıch plan was an attempt to avoid, if possible, having to ıake an outright contribution to repair the bank's imaired capital, unconditional and without expectation of eimbursement. If such a plan was put into execution uring and after June, 1931, it was put into execution in ıe face of warnings on various occasions from the Comproller of the Currency between July, 1930 and November, 931 that payments made to repair the impaired capital ıust be considered as voluntary and unconditional conibutions, without obligation of repayment [Finding XI, r. p. 89]. While appellants do not bring up on this apeal all the material evidence in this regard they do refer an exchange of letters in 1930 between the bank and ıe Comptroller's office [Tr. p. 109 and App. Br. p. 14] nd they do quote a part of a letter dated August 20, 1931 rom said Comptroller's office [Tr. p. 112 and 113]. These ill give the appellate court some suggestion of the evience before the trial court. We insist that it is not true, s appellants claim it to be [Tr. p. 8], that the first notice eceived by the directors and stockholders that the Comproller's office viewed their contribution as a loan with istaste and felt that the money "should be a voluntary ontribution which need not be repaid by the bank," was ıbsequent to June, 1931, to-wit, in August, 1931. The ourt specifically found that as early as July, 1930 the omptroller notified and instructed the bank that conibutions to repair impaired capital must be voluntary nd unconditional, without obligation of reimbursement; nd of course appellants' incomplete record does not bring p to this court all the evidence in support of this finding. here was more than a "distaste" and "feeling" on the omptroller's part. There was notification and instruction.

Appellants say that Waldron, Lamm's successor as bank examiner, approved the plan (App. Br. p. 8). This is a conclusion unjustified even by the incomplete testimony in the record on this point [see Tr. pp. 107, 123 and 124], and seems to be based merely on a statement by Dolan, the president of the bank, that "Waldron seemed to think that this was O. K." [Tr. p. 107.]

Appellants say that "many of the bonds" involved in the bond account were sold and an appreciation shown in their value (Br. p. 9). If by this they mean to imply that an appreciation was shown in many, they are mistaken in the light of even the incomplete evidence brought up from the lower court. Defendant's Exhibit H [Tr. pp. 127 and 128] shows on the sale of two sets of bonds after June, 1931 an appreciation totalling a mere $655.62, and on the sale of the remaining sets of bonds after June, 1931 a further large and bad depreciation totalling $137,058.67; with the result that on the bond account as a whole there was a further net depreciation of $136,403.05 below the book value of the account as of the time of the alleged purchase of the depreciation in June, 1931. Restricting ourselves to this one exhibit, without having before us the complete testimony in explanation of it, we nevertheless can see that if it shows anything it shows merely a further bad slump in the bond account, plummeting the bank into a worse condition than before and leaving nothing for appellants even on their own theory as to their rights to share in any appreciation in the bond account.

Finally, we disagree very definitely with appellants' contention (Br. p. 9) that there appears in the record—by which we assume they mean the record in the trial and not in the appellate court—exhibits and evidentiary matter "entirely irrelevant to the issues before this court." If such relevancy is to be tested it cannot be tested by the *ipse dixit* of appellants but only by placing such exhibits and evidentiary matter before this court for examination by it.

The issue is not, as appellants contend it is (Br. p. 9), "solely the question as to whether or not an agreement between a national bank and the directors and stockholders thereof for a loan of private moneys to the bank made upon the advice of the bank examiner for the bank is valid." There is much more to the issue than that. Here we have a defunct bank which ever since January, 1934 has been in the hands of a receiver [Tr. p. 5], for liquidation primarily for the benefit of creditors. Certain officers and stockholders of the bank assert that on or about June 18, 1931 they entered into an agreement with the bank whereby they purchased a rather nebulous thing which they refer to as the depreciation then existing in the bond account, the bank agreeing to pay to them from time to time any prorata decrease which might appear "in said depreciation of said bond account" [Tr. pp. 5 and 6]. They assert that by reason of the fact that a receiver has been appointed and the bank's assets are being liquidated the consideration for the payments made to the bank in buying such depreciation "wholly failed," and therefore that the bank is indebted to them in the amounts of their re-

spective payments [Tr. pp. 6 and 7], which amounts are now represented by claims filed with such receiver [Tr. p. 7]. They also set forth their respective causes of action in the alternative form of counts for money loaned to the bank for the use and benefit of such officers and stockholders, the bank having promised to repay same on demand.

Admittedly the purpose of the whole business of raising money was to repair the impaired capital of the bank. The real issue before the trial court was not as simple as appellants pretend. In fact it was multiple and was substantially this: whether or not appellants actually entered into the sort of agreement contended for by them; whether or not such an agreement could legally be made in the face of the prior, concurrent and subsequent warnings of the Comptroller of the Currency to the bank that payments made to repair impaired capital must be considered as voluntary and unconditional contributions, without obligation of repayment by the bank; whether or not, assuming such an agreement to have been made, appellants were estopped to assert same in the face of other creditors—depositors and third parties—who relied, and had a right to rely, on an unimpaired capital: whether or not there had been, as claimed by appellants, a failure of consideration; and whether or not, assuming the existence and validity of such an agreement, there actually was an appreciation in the bank account subsequent to June, 1931, to which they were entitled. There incidentally arises the question as to whether or not, if the so-called purchase of the depreciation in the bond account was made at the suggestion of the bank examiner, the appellants have rights which otherwise they would not have had.

Reply to Appellants' Summary of Their Argument and Points of Law.

Appellants' summary of their argument and points of law appears on pages 11 and 12 of their brief. Under point 1 appellants contend that as the minutes of the June 18, 1931 directors' meeting (Exhibit 1) and the directors' resolution (Exhibit 4) recite the contributions by the stockholders and directors and their intent to enter into an agreement with the bank that such contributions were made as a loan, there is thus created a "conclusive presumption" as against appellee that such contributions were in fact made and that such agreement was valid; and in support thereof is cited the case of *Yazoo State Bank v. Kimbrough,* 127 So. 265. We are unable to fathom how this startling result follows and certainly the cited case (more fully discussed hereafter) is no authority for the point attempted to be made.

With reference to appellants' point 2, this need only be said: notice from the Comptroller was prior, not subsequent. The court has specifically found that at various times between July, 1930 and November, 1931 the Comptroller of the Currency notified and instructed the bank, and its officers and directors, that payments to repair the impaired capital of said bank *must* be considered as voluntary and unconditional contributions, without obligation of repayment [Tr. p. 89, Finding XI]. Appellants assert they entered into their contribution arrangement on or about June 18, 1931. July, 1930 was obviously prior to June, 1931. Nor can appellants in this appeal select from the exhibits one letter only and attempt to predicate upon in their attenuated argument tht the Comptroller merely intended that they *should* not—not that they *must* not—enter

into the arrangement heretofore described. The fact that said letter was not seen by those contributing stockholders who were not also directors can have no effect, because the stockholders are bound by what their agents, the directors, do in the management of the bank.

With reference to appellants' point 3, this need only be said: First, the broad statement that the receiver of a national bank succeeds to no rights beyond those which could have been enforced by the bank, its stockholders or creditors, may, unless explained or qualified, be highly misleading. It must be borne in mind that once a bank has failed and gone into receivership, it frequently happens that its general creditors may have a distinct legal advantage over its officers, directors and stockholders, even though as between the officers, directors and stockholders themselves one group may, after the bank's general creditors have been satisfied, have a legal advantage over another group, for example, contributing over non-contributing stockholders. This is recognized by such cases as *Utley v. Clarke,* 16 Fed. Supp. 435, *In re Hulitt,* 96 Fed. 785, and *Heath v. Turner,* 77 S. W. (2d) 9. Second, there was under the circumstances no obligation on the receiver to account, but assuming for argument, that he should account, the only evidence in the record possibly bearing on the matter is Exhibit H [Tr. pp. 127-128], which clearly shows that there was not only no appreciation in the bond account but that there was actually a further depreciation of approximately $136,400.00 after June, 1931. There is no evidence that any bonds other than those listed in Exhibit H are involved in this action. We are unable to see the applicability of *Way v. Camden Safe Deposit & Trust Co.,* 21 Fed. Supp. 700, and *Brown v. Schleier,* 112 Fed. 577.

With reference to appellants' point 4, the evidence learly shows the contrary, namely, that there was no ailure of consideration by reason of the appointment of a eceiver and the liquidation of the bond account. The epreciation in the bond account was, if we are to take laintiffs' view of it, bought in June, 1931. No receiver ras appointed until January, 1934. Thereafter bonds were old at various times between February, 1934 and October, 936 (Exhibit H). Although the evidence brought up in ie appeal record is incomplete, it is nevertheless clear that ie depreciation was bought or the contributions made, hichever be the fact, as an expedient to repair the npaired capital of the bank as it existed in June, 1931. 'hat was the impelling motive and consideration: to keep ie bank open. The bank did continue open for two and half years. That was ample consideration; besides hich, assuming appellants' own contention as to the rrangement itself, there was a chance of the stockholders iaking money or at least recovering their money if things ent well and the bond account appreciated sufficiently with me. *Skinner v. Rich,* 55 Pac. (2d) 1146, is hardly an uthority for appellants' contention: quite the contrary hen analyzed. Here the stockholders, to avoid an assess- ient, made an odd sort of contract with their bank in eptember, 1931 to guarantee the reduction of certain ssets from the then book value of $7682.00 to $4432.00, ich reduction to be made in the amount of $1250.00 on or efore December 31, 1931, and the balance of $2,000.00 n or before December 31, 1932, provided certain condi- ons were met by the bank itself. All this was done to ieet the objections of the State Superintendent of Banks ith respect to certain assets valued—unjustifiably, as he iought—at $7682.00. The stockholders made good the

first amount of $1250.00, but in April 1932—before it came time to make good the balance—the bank went into receivership. The court held that the stockholders could not be sued for this balance because the bank itself could no longer meet the condition precedent required of it, towit, that it restore its impaired capital by December 31, 1932. The court points out that the parties who contracted had in contemplation the continued operation of the bank until, at least, the date of the final payment.

> "The bond (contract) provided in effect that if the bank were unable to make up the deficiency, through earnings or otherwise, the defendants would pay the sum necessary to restore the impaired capital. To recover on such a bond it was essential to allege and prove the failure of the bank to restore its impaired capital." (P. 1149.)

Incidentally there is a strong dissenting opinion, supporting the proposition of an immediate liability upon the contracting stockholders. In any event the facts of that case differentiate it clearly from our case. We invite attention to the following apt statement by the court at page 1148:

> "We see no merit to the contention of the defendant Rich (a stockholder) that the alleged contract is without consideration. The defendant stockholders were threatened with an assessment in order to operate the bank. The forbearance to demand such assessment constituted the consideration. The defendants (stockholders) were undoubtedly benefited by such forbearance" (citations).

In our case the June, 1931 contributions, or whatever they may be called, avoided the closing of the bank which doubtless would have ensued had the impaired capital not been

epaired; and, as we have said, the bank continued open or two and a half years.

As to appellants' point 5, it is sufficient to say that the laim involved in *Eisele v. First National Bank,* 137 Atl. 27, was wholly different from the claim involved in our ase. In the *Eisele* case the bank directors, in order to over a loss resulting from a depositor's heavy overdraft, aid into the bank money sufficient to meet the draft-eficit which was subsequently paid in full by said de-ositor. As the court says, at page 828:

> . . . "The situation presented is the simple one where one party in whose favor an obligation may exist has been indemnified or paid by one who, under some form of pressure, felt he was obliged to so respond, and later on the principal obligor or debtor himself pays the obligation in full. Under such circumstances it would be inequitable for the grantee or obligee to retain the money of both obligors; and manifestly the one who was only secondarily liable should be entitled to have the money paid by him returned. Otherwise the obligee would be unjustly enriched to the extent of having received payment of its obligation twice."

The case is distinguishable from ours on several grounds. 'or one thing, it is not a case of repairing impaired capi-al. For another, it concerns a double payment of a debt. n our case, there could be no double payment, or analagous ituation, because the bond account was in a worse state f depreciation when the bonds were sold than when the epreciation was allegedly bought in June, 1931.

The matters just discussed will be amplified as our rgument progresses.

Reply to Appellants' Preliminary Observations.

We must take issue with certain of appellants' Preliminary Observations (App. Br. pp. 13 and 14).

It is not true, despite appellants' repeated insistence to the contrary, that the pleadings raise but one issue—the "validity" of the alleged agreement between the bank and appellants. As heretofore pointed out by us, considerably more is involved. It is untrue that "appellee bases its whole case" on letters from the Comptroller to the Board of Directors that contributions to restore capital should be made unconditionally and without expectation of reimbursement, including a letter dated July 2, 1930, in respect to what appellants assert to have been an entirely different transaction without bearing on the issues in this case. Appellee bases its "whole case" on all the evidence adduced at the trial and upon which the trial judge made his findings of fact and conclusions of law. Appellants state that "no attack is made on the agreement of June 18, 1931 except the validity thereof, based upon the letters." This is not so. Respondent has denied that appellants ever entered into any such agreement as contended for by appellants [Tr. pp. 5 and 6, paragraph IV, and p. 51, paragraph IV], has denied the alleged total failure of consideration [Tr. p. 6, paragraph VII, and p. 51, paragraph VII], has denied any indebtedness on the part of the bank to appellants (*ibid.*), has denied any loan by appellants to the bank for the use and benefit of the appellants [Tr. p. 25, paragraph II, and p. 67, paragraph II], and in brief

as put in issue most of the important contentions of ap-
ellants.

Nor is it true that "the evidence, without contradiction
r conflict, shows" the results claimed by appellants. In
his connection we again invite attention to the fact that
nly a part of the evidence has been brought up on appeal
–such part, presumably, as appellants believe will lend
upport to their contentions. Appellants confine them-
elves to quoting a part of one letter only from the Comp-
roller and make references, wholly unjustified by the real
acts, to another letter from him. It is purely gratuitous
ɔ assert that the directors and stockholders did not until
934 receive their first definite notice that the Comptroller
vould not recognize their alleged agreement as valid.

These matters have in effect been decided against ap-
ellants by findings—unimpeachable in this appeal—of the
rail court.

I.

Reply to Part I of Appellants' Argument.

We do not question the rule that directors of a bank can make a valid contract with it in the absence of fraud, bad faith or undue influence. What bearing, however, can this rule have on our appeal? A casual reading of the five assignments of error set forth on pages 15 to 18 of appellants' brief discloses that, in final analysis, they go, not to the question of fraud, bad faith or undue influence, but merely to the sufficiency of the evidence upon which the trial judge predicated certain of his findings of fact, and to the sufficiency of his findings to support one of his conclusions of law.

Apart from other difficulties, appellants run into this insuperable difficulty which at the outset we are constrained to urge, to-wit: that in order to attack the sufficiency of evidence and urge as error the absence of substantial evidence to sustain findings, all the material evidence must be incorporated in the bill of exceptions with the motion or request challenging the sufficiency of the evidence, the ruling of the court, and the exception thereto.

Obviously, there has been no attempt made to set out in the bill of exceptions all the material and relevant evidence received at the trial on the basis of which the trial court made the findings challenged by appellants here and elsewhere in their brief. Hence assignments of error Nos. 3, 4, 6 and 7 cannot be urged in this appeal.

> *U. S. v. Copper Queen Mining Co.*, 185 U. S. 495; 46 L. Ed. 1008;
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> *Nashua Savings Bank v. Anglo-American etc. Co.*, 189 U. S. 221; 47 L. Ed. 782;

Krauss Bros. Lumber Co. v. Mellon, 276 U. S. 386; 72 L. Ed. 620;

Gurantee Co. of No. Am. v. Phenix Ins. Co. (C. C. A.), 124 Fed. 170;

Farinelli v. U. S. (C. C. A. 9), 297 Fed. 198;

Oregon-American Lumber Co. v. Simpson (C. C. A. 9), 8 Fed. (2d) 946;

Rasmussen v. U. S. (C. C. A. 9), 8 Fed. (2d) 948;

Mayer v. White (C. C. A.), 12 Fed. (2d) 710;

McHale v. Hull (C. C. A.), 16 Fed. (2d) 781;

North River Ins. Co. v. Guaranty State Bank (C. C. A.), 30 Fed. (2d) 881;

Stinson v. Business Men's Acc. Assn. (C. C. A.), 43 Fed. (2d) 312;

Hall v. U. S. (C. C. A. 9), 48 Fed. (2d) 66;

U. S. v. Densmore (C. C. A. 9), 58 Fed. (2d) 748.

In addition to the requirement that all the evidence, or ie substance of it, be set out in the bill of exceptions, here the question of sufficiency of the evidence is to be aised on appeal, the general rule requires that the bill ontain a statement over the judge's certificate that it conains all the evidence or at least all the material evidence:

Lesser Cotton Co. v. St. Louis etc. Ry. (C. C. A.), 114 Fed. 133;

Oregon-Am. Lumber Co. v. Simpson, supra;

Rassmussen v. U. S., supra;

Smith v. U. S. (C. C. A. 9), 9 Fed. (2d) 386;

Hall v. U. S., supra.

Not only does the record itself show that only parts of the testimony and only four of the exhibits have been brought up, but the judge's certificate [Tr. p. 142] does not pretend to state—as in fact it could not state—that the bill of exceptions contains all the material evidence offered and received on the trial, including all rulings made during the trial which were excepted to—in the form of certificate customary where insufficiency of evidence is to be urged before the appellate court.

As to appellants' assignment of error No. 10, predicated upon alleged error of the trial judge in making conclusion of law No. 1, only this need be observed: that such an assignment, in the words of *Gartner v. Hays* (C. C. A.), 272 Fed. 896,

> "presents nothing but the question whether or not the court's findings of fact sustain its legal conclusions."

If the findings are not reviewable or, being reviewable, are of themselves sufficient to support the conclusion of law complained of, no further inquiry will be made into such conclusion. In other words, the conclusions depend on the findings and if the findings stand and are of themselves broad enough to justify the conclusions reached, the inquiry is closed. We submit that a mere perusal of the extensive findings in this case—particularly findings Nos. IV, V, VII, X and XI [Tr. pp. 84-89]—will disclose that they amply sustain conclusion No. 1 which is challenged in assignment of error No. 10.

We also invite attention to the fact that in the trial ourt the appellants made no request for specific findings f fact or declarations of law before the case was subnitted for decision by the court sitting without a jury. In nis connection we invite attention to *Denver Live Stock 'om. Co. v. Lee* (C. C. A.), 18 Fed. (2d) 11, and quote rom page 14 thereof:

> "This court has many times set forth what it is necessary for counsel to do in the trial of a jury-waived case in order to preserve the right to have reviewed the question of the sufficiency of the evidence to support the finding or findings of the trial court. In the case of Allen, Collector of Internal Revenue, v. Cartan & Jeffrey Co. (C. C. A.), 7 Fed. (2d) 21, 22, this court said, quoting from the former decision in Wear v. Imperial Window Glass Co. (C. C. A.), 224 Fed. 60, 63:
>
> " 'They invite this court, in other words, to retry this case and to determine whether or not, under the applicable law the weight of the evidence sustains the finding and judgment. But the case was tried by the court below without a jury, and its decision of that issue is not reviewable in this court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue *in favor of the requesting party.* No such request was made in this case, and the specifications of error, therefore, present no question reviewable by this court. When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special

finding of facts, the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, "for any error of fact" (Revised Statutes, Sec. 1011; U. S. Compiled Stat. 1913, Sec. 1672, p. 700), and a finding of fact contrary to the weight of the evidence is an error of fact.'" (Citing numerous cases.)

See, also:

Lahman v. Burnes Nat. Bank, 20 Fed. (2d) 897;

American Surety Co. of N. Y. v. Cotton Belt Levee Dist., 58 Fed. (2d) 235.

Appellants cite a number of cases (App. Br. pp. 19-21) in support of the proposition that directors of a bank can make a valid contract with it in the absence of fraud, bad faith or undue advantage. We do not, as we have said, question this but frankly we fail to see what applicability it has here. No charge has been made that any officer or director or stockholder acted in bad faith. Borrowing some phraseology from *Utley v. Clarke,* 16 Fed. Supp. 435, at 438:

"In what is here said it is not intended to reflect upon the character of the parties involved. They were mortal men, nor more gifted with clairvoyance than other bankers or men generally. Like many others, they hoped for a return of better days, values, and banking conditions. But 'Hope deferred maketh the heart sick,' and disaster came at last with broken banks and broken men."

In any event, the question of good or bad faith would go
erely to the sufficiency of the evidence, and the evidence
s been passed upon by the trial court. The appeal record
such that any alleged error in this respect cannot now be
ged.

With reference, however, to the general merits of ap-
llants' contentions we desire in passing to comment on
*udley v. Citizens State Bank of Santa Monica, Booth v.
elles, In re Hulitt* and *Yazoo State Bank v. Kimbrough*
cause we believe that appellants feel that these cases have
me special applicability to their situation.

Dudley v. Citizens State Bank, 103 Cal. App. 433, was
action to recover money temporarily advanced by the
intiff to the defendant bank while plaintiff was an officer
said bank and until the need for the money could be
herwise taken care of by action of the directors of the
nk. The court of course held he could recover it, but
ry aptly adds this pertinent statement:

> "A review of the authorities cited by the respective counsel would serve no useful purpose. It is sufficient to say that *if the circumstances show a voluntary payment, or a payment under circumstances where the law implies a gift, no recovery can be had*" (p. 442) (italics ours.)

Booth v. Welles, 42 Fed. 11, involved a situation wherein
e Comptroller of the Currency notified a bank that its
pital was impaired but that it could continue business on
e directors putting in $100,000 in cash and retiring that
nount of objectionable securities. The money was put
but the objectionable securities—which under the ar-
ngement were to be segregated—were to the extent of
out $35,000.00 never in fact segregated, and later on the

bank went into receivership. It was held that the bank was liable for the $35,000.00 as upon a debt. A comparison between the facts in that case and in ours shows a patent difference. We respectfully invite attention to the fact that in the *Booth* case no recovery of the $100,000.00 was sought; it was sought to hold the bank only in respect to the $35,000.00 in objectionable securities, being a part of the total of securities which were to be yielded up for the $100,000.00. When properly analyzed there is nothing in that case inconsistent with our contention in the instant case.

In *In re Hulitt*, 96 Fed. 785, certain stockholders of a bank paid an assessment made to comply with the Comptroller's requirement that an impairment in capital be repaired. The assessment was in fact invalid because made by the directors instead of by the stockholders. It was held that, the bank having gone into receivership, those stockholders who had paid their assessments in good faith were entitled to be treated as creditors as against non-paying stockholders and should be repaid the amounts so paid before a general distribution of remaining assets was made among all stockholders. That case is no authority for the contention of appellants here. The question was one merely of priority between paying and non-paying stockholders. There was no assertion that the paying stockholders had a right to come in on a parity with the general creditors of the bank.

In *Yazoo State Bank v. Kimbrough*, 127 So. 265, certain officers of a bank put up cash to take the place of notes which the bank examiner had rejected, it being agreed that such notes should be carried by the bank as a trust fund for the benefit of such officers and that the proceeds

: the notes when collected should be distributed ratably them. It was held that the transaction amounted to a .le of notes for cash at the face value thereof, and that deceased officer's legal representative was entitled to :cover his share of such of the notes as had been llected. Of significance to us, however, is the following atement by the court, at p. 267:

> "The bank assumed no obligation to make good any deficit or loss that the directors might sustain as a result of the failure to collect the notes."

In our case the appellants assume apparently inconsistent sitions: in one breath they say they bought the deprecia- on in the bond account and want the appreciation in the :preciation of the bond account; and in another breath ey say they are entitled to recover the entire amount of eir contributions because the consideration for which id contributions were made has wholly failed.

If in fact they bought the so-called depreciation, they ought a very odd sort of uncertainty—like, for instance, e possible or hoped-for rise in a thermometer above me stated degree. As it turned out there was no rise— at is, appreciation—and the contributors simply lost out their gamble and hopes. For this the bank cannot be eld responsible. As said in the interesting and pertinent se of *Tyler v. Reynolds,* 197 S. E. 735, at page 739:

> "The depreciation of the bond account of the bank has not been and never will be recovered, the bank is hopelessly insolvent, a receiver is in charge of its affairs, its business is being wound up, its assets reduced to cash and distributed upon its indebtedness, and the corporation exists only for that purpose."

Nevertheless the contributors got what they were really most interested in, namely, keeping the bank open. It is ridiculous to say that the consideration wholly failed because the bank remained open for only two and one-half years after the alleged arrangement had been entered into. Their contributions—whatever the guise under which they were made—were, in words borrowed from the interesting case of *Delano v. Butler, Receiver of Pacific Nat. Bank,* 118 U. S. 634, at page 655:

> "the price paid for the privilege of continuing its (the bank's) business, in the hope of saving their investment. . . . The mistake, if any, is one for which each shareholder is alone responsible."

Considerably in point on the question of this alleged failure of consideration is the case of *Coast National Bank v. Bloom,* 174 Atl. 576 (N. J.), involving the collection of a note of defendant, a stockholder and director of the bank. The Comptroller of the Currency had, in view of depreciation in the bank's bond account, demanded that the assets be increased by a stated amount. The directors met this demand by establishing a fund, partly in cash and partly in promissory notes, including the note sued on. There was an apparent understanding among these directors and the bank that when the bond account returned to a market value which would no longer impair the capital, surplus and profits, the several sums advanced would be returned to them with interest. The defendant raised the defense that there was "a breach and frustration of" this agreement which discharged his obligation. This is referred to by the court and disposed of as follows:

> ". . . it is contended that 'an implied term of said agreement was that the bank should hold said bonds

and continue to do business, and that the sale of said bonds and the closing of the bank constituted a breach and frustration of said agreement, and that, in consequence thereof, the plaintiff has no legal right to enforce payment of the note.' The argument seems to be that a reasonable time for appreciation of the securities must have elapsed before a cause of action on the note accrued, and that the receivership made it 'impossible for the bank to perform its promise' in this regard. But this was clearly not an implied condition of the contract. The parties did not contemplate that the bond account should remain frozen, awaiting the day of equality between the market and the book values. . . . Moreover, it was a contribution to the capital fund to avert a closing and receivership, and it likewise was not within the contemplation of the parties that, if and when the day of misfortune should come, liquidation would be deferred indefinitely awaiting an appreciation of the securities. It is evident that, in that situation, this fund was to be instantly available for the payment of the bank's obligations, in the liquidation process. Incidentally, it is conceded that from the time of the giving of the note until the trial of the issue herein, a period of more than two years, the depreciation in the securities continued" (p. 579).

Not one of the cases cited by appellants is, in final analy-
, applicable to our situation because in not one of them
is there this controlling circumstance which is to be
und in our case, to-wit: that the supervising government
icial had at various times warned the contributors that
yments to repair impaired capital must be considered as
luntary and unconditional, without obligation of repay-
ent (Finding of Fact No. XI).

Appellants insist (App. Br. p. 18) that their contributions "were not voluntary contributions," that "they were made to take up a deficiency in the bond account at the instance and request of the bank examiner" who was a representative of the Comptroller, and that "the consideration for the contributions made was the depreciation in the bond account." They admit, however, that "had it not been for such contributions the bank's capital would have remained impaired and under the National Banking Act the Comptroller of the Currency would have had to cause it to close its doors."

Whatever the bank examiner himself may or may not have suggested to the directors and officers, the Comptroller—the ultimate authority—had written them directly upon the point and warned them as above set forth. Such written instructions would obviously supersede any expressions on the part of the examiner. In this connection we invite attention to the following from *Anderson v. Akers,* 7 Fed. Supp. 924, at page 936:

> "The special master, while apparently recognizing the ultra vires character of these acts, thought that various statements of bank examiners in their reports, from time to time, to the Comptroller of the Currency, expressing satisfaction with the course of the bank in this connection, had the effect of relieving the directors from liability for those acts. I am unable to agree with this view. Assuming, as is found by the special master, that these statements of the examiners were brought to the attention of the directors, it

seems to me plain that such *statements merely represented the views of such examiners as individuals* and could not make proper what was, as a matter of law, ultra vires and therefore unlawful, nor affect the liability of such directors for permitting what they must be deemed to have known was unlawful" (italics ours).

We also invite attention to the case of *Bernard v. Em-ett State Bank,* 257 Pac. 949 (Kan.), which was a suit y a bank stockholder against the bank and receiver thereof recover a sum he had paid as an assessment on his ock, the stockholder contending that, under the instruc-ons of the deputy bank commissioner and the oral agree-ent between the stockholders when the assessment was ade, to the effect that the funds so raised were not to be sed until all assessments were paid, his funds were illegally sed, certain stockholders never having in fact paid the ssessment and the bank soon afterward having closed its oors. Judgment went against the stockholder. On appeal e court said:

". . . these matters, . . . we think are disposed of by the decision in the Needham case, above cited, on the theory that a bank assessment is absolutely voluntary. It is entirely voluntary with the stockholders whether or not any assessment be made. The bank commissioner cannot compel or coerce one to be made. He may close the bank if it is not made. It is an assessment on the stock and not on the stockholder, and, further, if it is made by vote of the

stockholders, it need not be paid. The stockholder pays the assessment only because he thinks the stock is worth more than the assessment. . . .

"It was held in the Needham case, above cited, concerning an assessment under this section of the statute, as follows:

" '*Payments made by stockholders to a bank in consequence of impairment of capital, with purpose or effect to repair breach in capital or to keep the bank a going concern, are voluntary payments, however induced.* . . .' Para. 2, Syl.

"The instances to which references are made as to inducements in said case are where the deputy bank commissioner told the stockholders the assessment would put the bank in good condition and they would not need any more assessments, and where two deputy bank commissioners were said to have told the stockholders that the assessment would keep the bank going and would avoid the double liability. These were the circumstances involved in the above case where the court held the assessment was voluntary nevertheless —voluntary as to the stockholders collectively in making the assessment, and voluntary as to the individual stockholder in paying it or letting his stock be sold without any personal liability being involved. 'The obligation to pay an assessment runs to the bank, and the stockholder who pays does so for the benefit and security of the bank as a going concern, and to keep it in operation.' Citizens' Bank v. Needham, *supra,* page 539 (244 P. 14)." (Italics ours.)

In the *Needham* case—*Citizen's Bank of Lane v. Needam*, 244 Pac. 7 (Kan.)—the court in discussing the effec- veness and voluntary character of assessments to make ood impaired capital, despite pressure by the state bank ommissioner and despite erroneous representations by him s to the result or effect thereof, makes the following in- eresting statements, on page 10:

> ". . . In practice he may induce assessment for that purpose by calling attention to his plenary authority. It is conceivable the suggestion may take the form of bald threat. Should stockholders act on the suggestion, whatever its form, and, pursuant to call, hold a meeting and levy an assessment, they act voluntarily. In a certain sense there is comstraint. *The constraint, however, lies in the impairment of capital stock, which must be made good if the bank is to continue in business. . . .*
>
> *"The stockholders contend they paid the assessments on their stock under representations of the bank commissioner or his subordinates that such payments would discharge double liability.* . . . Conceding, for present purposes, that stockholders were advised, and relying on the advice believed, that payment of stock assessments discharged double liability, the advice consisted of *expression of opinion* concerning a matter of law. . . .
>
> ". . . *and payment of a stock assessment is none the less a voluntary payment because of ill-founded belief concerning effect of the payment* on double liability" (italics ours).

Before we conclude discussion of this phase of the matter, another case which is of interest should be noted. It is *Utley v. Clarke*—already referred—to an action involving an alleged loan to enable a bank to remain open. The complaint admitted that the plaintiff was requested to make the loan and did make the loan to the bank because the Comptroller required $25,000.00 to be added to the assets of the bank "in order to bolster up said assets, in default of which said bank could be closed." The court says that the plaintiff "must have known that, if its assets were to be increased by his $25,000 in securities, there could be no corresponding obligation to him shown on the books of the bank. The result was to give a fictitious representation of assets to liabilities." And it continues:

> *"While, if the bank were solvent and a going concern, plaintiff might recover, he cannot recover when he has been party to a deception upon the depositors and creditors of the bank and upon the Comptroller of the Currency when the bank becomes insolvent and his securities are taken by the receiver. He is estopped from asserting his claim as against depositors and other creditors.*
>
> "Best, Receiver, v. Thiel, 79 N. Y. 15, 18, is a case in close analogy. Thiel, a director of the bank, gave a mortgage of $70,000 to one Hall, and the latter at Thiel's direction assigned it to the bank to enable it to keep open and continue business. The bank failed, and, in an action by the receiver to foreclose the mortgage, Thiel, among other defenses, asserted that the mortgage was without consideration, and therefore void. The court rejected all defenses and granted the foreclosure. The Court of Appeals said, upon the question of Thiel's liability:

" 'It was given expressly to make up the deficit in the assets of the bank and to enable it to go on with its business. It was reported to the banking department as a portion of the assets and was in effect represented to the depositors of the bank as a portion of the assets, and all this was done by the defendant and with his knowledge and assent. It was in consequence of this and other securities given by other trustees, that the superintendent of the banking department, acting officially for the public and all the creditors of the bank, permitted the bank to continue its business.

" 'It was in reliance upon this and the other securities given, that depositors were induced to make and leave deposits in the bank; and hence, upon the clearest principles of justice and morality, the defendant should be estopped from denying the validity of this mortgage.'

"If the mortgagor there was estopped from denying the validity of his mortgage, so the plaintiff here, who loaned his securities or his money for the like purpose of keeping open the bank of which he was director and stockholder when the obligation of the bank to him was suppressed, withheld, and concealed with his knowledge and assent, is likewise estopped from recovery against the receiver.

"There are many cases where directors and stockholders, to keep banks open, gave notes and other obligations and were held liable on the notes as given for a valuable consideration and estopped from setting up as a defense lack of consideration" (page 439) (italics ours).

In this connection attention is also invited to the case *: Feliciana Bank & Trust Co. v. City Bank & Trust Co.,*) So. 600 (La.). Here, to satisfy the bank examiner,

an ostensible loan was made to a bank in failing circumstances, the amount being deposited to its credit in the defendant bank, but the failing bank executing a note therefor. This bank was ultimately taken over for liquidation. The court held that:

> ". . . the deposit must be regarded as having been what the president of the defendant bank pretended it was—'an absolute, unconditional, *bona fide* checking account.' He could not contend, successfully or with good grace, that it was only a sham, arranged to defeat the banking law, deceive the bank examiner, and impose upon innocent patrons of the bank (p. 602).

The court held that the side agreement, between the two banks, "was contrary to public policy and was void," and gave judgment for the bank liquidator who brought the action to recover the money so deposited to the credit of the failed bank.

See, also:

> *Reed v. Mobley, Superintendent of Banks* (Ga.), 157 S. E. 321.

So here, we repeat again, that whatever the pressure on appellants to find a formula for repairing the impaired capital and whatever advice may or may not have been given by the bank examiner, the assessments were—and as a matter of public policy must be regarded as having been—voluntary assessments, the prime consideration for which was the continuance of the bank in business and not the acquisition of the so-called depreciation in the bond account.

II.

Reply to Part II of Appellants' Argument.

This part of appellants' argument (App. Br. pp. 22-24) ppears to be directed to three points; first, that the Comp-roller's letter concerning voluntary and unconditional pay-ients was not binding because received subsequent to the lleged June, 1931 agreement; second, that in any event it as not binding on those contributors who were stock-olders only and not directors; and third, that the Comp-roller's letter of the year previous was not binding be-ause it had reference to an allegedly entirely different ansaction.

Here again, the argument is directed purely and simply the weight and sufficiency of evidence. In the state of ie record on appeal and under the authorities heretofore ited it cannot be considered by the appellate court.

Nevertheless, for good measure we will discuss certain hases of the matter which strike us as of interest.

The trial court found as a fact that

> "on various occasions and at various times between July, 1930 and November, 1931 said Comptroller of the Currency . . . notified and instructed said bank, and the officers and directors thereof, that payments made to repair the impaired capital of said bank *must be considered as voluntary and unconditional contributions, without obligation of repayment;* that each and all of said persons who made said payments . . . *acquiesced by lapse of time and otherwise in said notification and instruction* . . .; that *said payments were* payments made to repair the impaired

capital of said bank and were, each and all, *voluntary and unconditional contributions,* without any obligation whatsoever on the part of said bank to repay same; that *the law requires all payments such as those made by plaintiffs* under the circumstances shown by the evidence herein to be *voluntary and unconditional* and without any obligation whatsoever on the part of the bank to repay same" (italics ours) [Tr. p. 89, finding XI].

It must be obvious to anyone reading even the incomplete record that during the whole course of the capital impairment of the bank—all during the time it was a "live issue"—the Comptroller reiterated the above rule as to the character of the contributions. It is gratuitous and, we submit, unsupported by the complete records for the appellants to make the statement that the Comptroller took the position that contributions merely *should* be—not that they *must* be—voluntary, that the occasion for the Comptroller's similar warning a year before was "an entirely different transaction," and that stockholders who were not directors were not bound by such instructions because they did not see them. We have already amply discussed most of this but, with reference to possible want of knowledge of the Comptroller's instructions on the part of non-director stockholders, we wish to point out that the officers and directors of the bank represent the bank and its stockholders in its dealings with third parties, and where the officers and directors lull the Comptroller or the public into believing that a capital impairment has been repaired in the way required by public policy and the

omptroller, the bank's stockholders will not, as against ie Comptroller or the public, be heard later to assert an iconsistent and different position which in effect would violative of the Comptroller's instructions and prejucial to the public.

In this connection note what is said in *Morrison v. rice, Receiver,* 23 Fed. 217, at page 221:

> "In controversies between stockholders and third parties, it is well to bear in mind that a corporation is but the representative of its stockholders; that it exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect; and when the interest of the public, or of strangers dealing with the corporation, is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally or inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled, so far as it may inequitably affect him. Sawyer v. Hoag, 17 Wall. 610, 623. . . .
>
> "The purpose of the voluntary assessment was to restore the impaired capital stock, in order that the bank might reopen. The only alternative was for the bank to pass into the hands of a receiver. The stockholders decided to levy the assessment. This may have been bad judgment, but general creditors cannot suffer for that reason. If the reorganization of the bank had proved successful, the stockholders might have saved their property."

Utley v. Clarke, supra, is another pertinent case on this point. In that case, the plaintiff and defendant Clarke were both stockholders of a bank, Clarke being also president. Plaintiff, at Clarke's request, assisted the bank with certain of his securities to prevent it from being closed by the Comptroller. The court said, at page 440:

> "It is quite true that plaintiff may not have fully realized the effect of the way in which the loan transaction was carried on. He in all probability left everything to Clarke. That, however, does not excuse him.
>
> "Nor could plaintiff recover against the bank if Clarke failed to carry out representations made to plaintiff of the manner in which the transaction would be handled. Plaintiff made Clarke his agent for the purpose of using the $25,000 to aid the bank to show unimpaired capital and to remain open. If Clarke failed to do it in the way agreed upon or which plaintiff expected, plaintiff cannot put upon the bank the duty of seeing that it was done as agreed. Federal Reserve Bank v. Crothers, 289 F. 777, 779, *supra.*
> . . .
>
> "Clearly, plaintiff cannot recover as against the depositors and creditors of the bank."

Of interest in this connection are passages in the following decisions:

Page v. Jones, 7 Fed. (2d) 541, at p. 545, and

Fallgatter v. Citizens Nat. Bank, 11 Fed. (2d) 383, at p. 385.

III.

Reply to Part III of Appellants' Argument.

In this part of appellants' argument (Br. p. 25) Find-
; No. XIII (undoubtedly meant to be XII)—finding
ıt no evidence had been presented proving any appre-
tion in the value of the bonds in the bond account and
ıt no evidence had been presented of any legal damage
loss suffered by plaintiffs—is challenged on the ground
ıt it is contrary to the evidence, both oral and docu-
ntary.

This point cannot, upon the authorities heretofore cited,
raised on appeal in the absence of a showing that all
terial evidence on the point is before the appellate
ırt.

As a practical matter, however, an examination of the
t itself of bonds referred to by appellants will show a
rther net slump and depreciation of about $136,400.00,
stead of an appreciation. We have already drawn atten-
n to this.

IV.

Reply to Part IV of Appellants' Argument.

How can it be seriously contended that appellants can predicate a legally tenable position for recovery on the statement that they "contributed to the fund for the purchase of said depreciation only as a loan to the bank, such moneys to be repayable to them by the bank, if and when the said bond account appreciated in value" (App. Br. p. 26)? If they *purchased* this vague and illusive thing called "depreciation in the bond account" there was obviously no *loan* to the bank.

Appellants of necessity admit that "it was the desire and intent and purpose of the appellants to aid the bank which was in distress due to an impairment of capital" (*ibid* p. 26). Well may we apply to this situation the words of the court in *Wright v. Gurley,* 63 So. 310 (La.), which was an action brought by seventeen persons who were stockholders and contributors to recover $40,000 remaining out of $98,000 contributed, after $58,000 thereof had been applied to the debts of the bank and the bank had been closed. The court held, contrary to the stockholders' contention, that the remaining $40,000 became part of the bank's assets and that the bank was not liable to them for its return; the court saying, at page 311:

> "The plausibility of this argument results from the substitution of the stockholders to the bank as the beneficiary of the donation. Very true the plaintiffs *did not intend to make a donation* to their fellow stockholders and did not do so; but they intended to and did make a donation to the bank. Their only purpose

in the transaction was that the bank should become the owner of the amount in question. Not the conditional owner, not the owner with a string to the gift, but the absolute, unconditional, untrammeled owner. *The contribution, coupled with a condition of any kind, would not have answered the purpose. The Bank Examiner had so informed the plaintiffs; and they understood perfectly, therefore, that they were divesting themselves now and irrevocably of this money* and investing the bank now irrevocably and unconditionally with it. The money became the unconditional and absolute property of the bank, with no liability whatever resting upon the bank for the return of it." (Italics ours.)

oubtless the contributors did not relish making their re-ective contributions, but this did not make them any the ss voluntary in legal contemplation. As said in *Andrews State ex rel. Blair, Sup. of Banks,* 178 N. E. 581 (Ohio) page 583:

> "The superintendent's authority is to give the notice, and, if the deficiency is not made good, to take possession of the bank and its assets and proceed to liquidate. *However imperative the notice, however drastic the alternative may seem, any payment by a stockholder towards restoration is voluntary.*"

nd finally, as said in the interesting case of *Broderick v. rown* (D. C., Cal.), 69 Fed. 497:

> "The law is well settled that where stockholders voluntarily assess themselves to relieve the corporation from pecuniary embarrassment, or for the betterment of their stock, whatever may be the occasion of the assessment, the *advances thus made are not debts against but assets of the corporation.* . . . While

there is some conflict in the oral testimony as to the nature of the transaction which eventuated in the raising of the $50,000 of which defendant's payment of $20,500 was a part, careful consideration of all the evidence satisfies me that the advances thus made were *not loans but voluntary contributions by the stockholders,* for the betterment of their stock, and to enable the bank to resume business. . . .

"The only possible theory consistent with the situation of the bank and the circumstances of the parties is that the transaction was a voluntary assessment" (pp. 499 and 500).

"For the reasons above indicated, my finding is that the $20,500 mentioned in defendant's answer was a voluntary contribution for the betterment of his stock, and therefore is not a debt against the bank" (p. 501).

In discussing what appellants refer to as "The Equities in This Proceeding" they again become involved—improperly in the state of the record—in a discussion of the evidence. Only certain items of evidence are referred to and these they interpret in their own way and contrary to the way in which the trial judge interpreted them. Though we are tempted to challenge certain flagrantly erroneous statements of what the evidence was—for instance, that the so-called agreement "was signed by the proper officers on behalf of the bank" (Br. p. 26), when in fact there was obviously no such signing—we shall limit ourselves merely to inviting attention again to the rule that alleged errors predicated upon insufficiency of evidence cannot in the state of this record be urged on appeal.

Furthermore, appellants cannot now be permitted to rgue this case "as a case in equity, rather than a case at ıw" (Br. p. 27). Such would amount to a change f theory on appeal. The action was filed as an action at .w, was tried as an action at law, and was appealed as an ction at law. Such change of theory is not permissible:

> *Ford Motor Co. v. Farrington* (C. C. A. 9), 245 Fed. 850;
>
> *Bovay v. Fuller* (C. C. A.), 63 Fed. (2d) 280.

No statement of the evidence, as required by Equity ule 75, has been prepared or filed; and such would be ecessary if this were an appeal on the equity side.

Appellants are foreclosed from arguing the alleged errors eferred to in this part of their brief for the further eason that their assignment of errors contains no assignent of such alleged errors. The rule is well established ıat the party complaining of the action of the lower court ıust lay his finger upon the point of objection, and must and or fall upon the case he has made in the court below. ppellate courts are not the proper forum for the discuson of new points. They are simply courts of review to etermine whether the rulings of the court below, as prented, are correct or not:

> *Walton v. Wild Goose Min. Co.* (C. C. A. 9), 123 Fed. 209.

We cannot refrain from commenting on appellants' atement (Br. p. 27) that "appellee contends that this greement was unlawful" and on appellants' argument redicated upon that statement. Appellants would appear contend that appellee's defense in the lower court was

predicated upon unlawfulness of the agreement. The fact is, and the pleadings so disclose, that the real question was whether or not an agreement of the sort, force and effect contended for by appellants had been entered into; and only incidentally did the question arise as to whether such an agreement, if actually entered into, would be unlawful. Appellee took the position that it would be unlawful. The trial court found that no agreement of the sort, force and effect contended for by appellants had in fact been entered into [Tr. pp. 84-85, Findings IV and V]. The court made, and we believe properly, a finding that "the law requires all payments such as those made by plaintiffs under the circumstances shown by the evidence herein to be voluntary and unconditional and without any obligation whatsoever on the part of the bank to repay same" [Tr. p. 89, Finding XI].

It is strange that appellants, after contending all the way through this case that there had been a lawful agreement, now take the position that the agreement may forsooth have been unlawful, that therefore "it was void from its inception," and that under the theory of unjust enrichment they are entitled to recover their money. This cannot now be urged for the first time.

Incidentally, in speaking of equities: is not the position of the general creditors of this insolvent bank, who relied upon and had full right to rely upon an unimpaired capital, much closer to true equity than the position of officers and stockholders of the bank who must, as a matter of public policy, be held responsible for the unfortunate financial debacle?

To the authorities heretofore cited by us let us add *Heath v. Turner,* 77 S. W. (2d) 9 (Ky.), noting what is said on pages 11 and 12:

> "Notwithstanding banks are organized and operated by individuals for private gain, they are in a sense public institutions, since they are depositories of the money of the country, and therefore are legitimate and proper objects of police regulation to preserve and safeguard their solvency. . . . The capital stock of a bank is in the nature of a trust fund for the protection and benefit of its depositors and creditors. It is therefore highly important that such fund be kept unimpaired. . . .
>
> ". . . Regardless of the equities between the other stockholders of the bank and the makers of the notes (themselves stockholders), and the effect of the agreement as between them, a matter which it is unnecessary for us to determine, the agreement could not and did not operate to thwart and nullify the policy of the law to the prejudice of the creditors and depositors. They were entitled to have the capital stock remain unimpaired. . . ."

Appellants' argument on the alleged "void" and "unlawful" agreement and on the alleged "equities" recalls to us the following pertinent passages from *Andrews v. State, ex rel. Blair, Supt. of Banks,* 178 N. E. 581, at page 583:

> "If the stockholders were mistaken about either facts or law, the mistake cannot be charged to the creditors;"

and from *Duke, Supervisor of Banking, v. Force,* 208 Pac. 67 (Wash.), at page 74:

> "The payments which the stockholders made resulted in the Scandinavian-American Bank continuing to function for a period of over a year thereafter as a bank. Additional liabilities were incurred, as the pleadings in these cases show, and, of course, the depositors changed their relationships relying upon the addition made by these stockholders to the funds of the bank. The bank's customers entered into new obligations, and the status of the business of the corporation was materially affected as a result of these payments. New contracts, debts, and engagements accrued. Were the question only between the corporation as such and these stockholders, it would be different from the question which is now presented between these stockholders and the creditors. After having been compelled to make an involuntary and illegal payment, a stockholder, if he had acted promptly, would be allowed to recover the amount of such payment, but after the rights of creditors have been affected, new creditors come into existence, and old creditors have changed their status, it is too late for the stockholders, after the result has proven that the assessments they paid in anticipation of a successful corporate life were unsuccessful, to now assert their rights, and they must be held to be estopped by their conduct from that assertion."

nd in *Schwenker, Com'r of Banking, v. Reedal,* 236 N. '. 603 (Wis.) (rehearing denied 238 N. W. 289), it was ld that a private understanding or agreement among the nk's stockholders signing a declaration—in connection ith their responsibility for the bank's debts—that the gning shall be conditional cannot affect their liability ereon to creditors after the same has been signed and ed as provided by the banking law.

The fact is that appellants, as contributors to the fund repair impaired capital, obtained what they were after, mely, keeping the bank from being closed by the Comp- oller. In this they succeeded for a period of two and a lf years commencing June, 1931. It is unfortunate for l concerned that the bank did not keep open permanently. hat was the chance these contributors took. They might called upon again to repair impaired capital, just as they ere called upon to do so in 1930 and in 1931. As it was, ey received ample consideration—more than is often the se with similar contributions made to extend life to a stressed bank.

Wright v. Gurley, 63 So. 310 (La.);

Interstate Trust & Banking Co. v. Irwin, 70 So. 313 (La.);

Union Bank of Brooklyn v. Sullivan, 108 N. E. 558 (N. Y.);

Skinner v. Rich, 55 Pac. (2d) 1146.

V.

Reply to Part V of Appellants' Argument.

In addition to other defects, based on matters heretofore discussed by us, the first two assignments of error appearing on page 29 of appellants' brief have the further inherent vice of being too intangible and indefinite to warrant serious attention by the appellate court.

By assignment No. 1 appellants complain merely that the Minute Order determining and ordering findings and judgment for defendants "was not in accordance with the law and the facts of the case." Circuit courts have repeatedly refused to consider, as being too uncertain and indefinite or as not in compliance with the rule of court, the following similarly defective assignments: that the verdict is contrary to the law or the evidence or both: *McClendon v. U. S.*, 229 Fed. 523; *U. S. Shipping Bd. v. Drew*, 288 Fed. 374; *Lahman v. Burnes Nat. Bank*, 20 Fed. (2d) 897; *Allen v. Hudson*, 35 Fed. (2d) 330; that the verdict and judgment are unsupported by the evidence: *Hecht v. Alfaro*, 10 Fed. (2d) 464 (C. C. A. 9); that the court erred in rendering judgment for the defendant: *U. S. v. Bowling*, 261 Fed. 657; *U. S. v. Atchison, etc. Ry. Co.*, 270 Fed. 1; and *Arkansas etc. Co. v. Stokes*, 277 Fed. 625; that the court erred in making findings of fact: *Gartner v. Hays*, 272 Fed. 896; that the court erred in making a finding and entering judgment for plaintiff: *Flanagan v. Benson*, 37 Fed. (2d) 69; *McCarthy v. Ruddock*, 43 Fed. (2d) 976 (C. C. A. 9); *McCaffery v. Elliott*, 65 Fed. (2d) 792.

By assignment No. 2 appellants complain merely that "the Minute Order of the Court denying plaintiff's Motion for a New Trial was not in accordance with the law." The

ower court heard plaintiffs' motion for a new trial and lenied it. Such action was discretionary. It is not stated n the assignment that the court abused its discretion, nor s there any argument whatever directed to that point. An ıssignment of this sort presents nothing for review and vill not be considered on appeal:

> *O'Brien v. General Acc. etc. Corp.*, 42 Fed. (2d) 48;
>
> *Van Stone v. Stillwell etc. Co.*, 142 U. S. 128;
>
> *Ill. Cent. R. Co. v. Horace Turner Corp.*, 9 Fed. (2d) 6;
>
> *Terzo v U. S.*, 9 Fed. (2d) 357;
>
> *Alvarado v. U. S.*, 9 Fed. (2d) 385 (C. C. A. 9);
>
> *Sun Oil Co. v. Gregory*, 56 Fed. (2d) 108.

Assignments Nos. 11 and 12 are predicated upon alleged errors of the trial judge in reaching certain conclusions of law. Such assignments, as heretofore pointed out, present nothing but the question whether or not the findings of fact are of themselves sufficient to sustain the conclusions of law based thereon. We refer back to our discussion of this point in our reply to part I of appellants' ırgument.

Of course part V of appellants' argument is subject to he same fatal objection as is most of their argument. Where insufficiency of the evidence is the basis of the objection all the material and relevant evidence received on the trial must be set out in the bill of exceptions; and he bill must contain a statement in the judge's certificate that it contains all the evidence or at least all the material evidence.

It might be added that the Circuit Court of Appeals, in reviewing a decision of the District Court, starts with the presumption that no error was committed in the lower court; the burden being upon the appellant to show prejudicial error.

> *Southern Ry. Co. v. Lester*, 151 Fed. 573;
>
> *Harris v. Moreland Truck Co.*, 279 Fed. 543 (C. C. A. 9).

And we might also repeat the cognate rule that in those cases where all the material evidence is not brought up in the record on appeal, by a proper bill of exceptions, statement of the evidence or agreed statement of ultimate facts, the appellate court will presume that there was sufficient evidence to sustain the verdict, findings of fact, or judgment. The same presumption will be indulged in whether the record is devoid of proper evidence, or contains only a portion thereof:

> *Harris v. Moreland Truck Co., supra;*
>
> *U. S. v. Stephanidis,* 47 Fed. (2d) 554.

In concluding part V of their argument appellants again change the theory of their case. They ask for an accounting and appear to throw into the lap of the appellate court the question whether this is an equitable or legal case. Not only is this change of theory not permissible but clearly, in view of the entire case, there is no legal basis whatever requiring or justifying an accounting.

Appellants repeat that we contend the agreement was unlawful. We have, we believe, already sufficiently explained our contention and there is no need further to go into the matter.

Conclusion.

In our argument we have not intended to limit ourselves to the objectionable features of appellants' argument arising out of their failure to make and present such a record as would permit the appellate court to consider questions of sufficiency of evidence. We have also sought to show that there is in fact no practical or genuine basis for any of appellants' contentions, even making allowances for the insufficient record; it being our firm belief that even if the appellate court had before it a more complete record of the trial there could be no other or different decision than that reached by Judge James. It is, of course, practically impossible to find in the reported cases a case exactly similar as to facts. However, cases of the sort cited by us in this brief, clearly show the correctness of the judgment rendered under the circumstances of the instant case.

We contend and urge that the judgment of the District Court should be affirmed.

Respectfully submitted,

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